No. 76-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; W. J. USERY, JR., SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; AFL-CIO; UNITED TRANSPORTATION UNION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Southern Railway Company requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix at pages 1a-11a. The order of the Court of Appeals upon denial of the petition for rehearing and the suggestion of rehearing *en banc* appears in the Appendix at page 12a. The order of the Court of Ap-

peals upon denial of the motion for reconsideration appears in the Appendix at page 13a. The decision and order of the administrative law judge of the Occupational Safety and Health Review Commission is reported at 13 OSAHRC 499 and appears in the Appendix at pages 15a-34a. The opinion of the Commission is reported at 13 OSAHRC 498 and appears in the Appendix at pages 35a-36a.

JURISDICTION

The judgment of the court of Appeals was entered on February 9, 1976 (App. p. 1a). A timely petition for rehearing and rehearing *en banc* was denied on March 15, 1976 (App. p. 12a). The time for filing a petition for certiorari was timely extended on June 7, 1976, by order of the Chief Justice, to and including August 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under § 11(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 660(a).

QUESTION PRESENTED

Has the exercise of statutory authority by the Federal Railroad Administration been sufficient to exempt petitioner's railroad maintenance and repair shop from application of the Occupational Safety and Health Act of 1970 under § 4(b)(1) of that Act, which exempts "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health"?

STATUTES INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 653(b)(1), reads as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 254 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Section 202(a) of the Federal Railroad Safety Act of 1970, 84 Stat. 971, 45 U.S.C. § 431, reads in pertinent part as follows:

> The Secretary of Transportation (hereinafter in this title referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on the date of enactment of this title, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. . . .

STATEMENT OF THE CASE

This is an action to review a final order of the Occupational Safety and Health Review Commission ("Commission") affirming two citations and notices of proposed penalty issued to Southern Railway Company ("Southern") by the Secretary of Labor ("Secretary") for alleged violations of regulations prescribed under authority of the Occupational Safety and Health Act of 1970 ("OSHA").

The proceedings herein began on October 9 and 10, 1973, when a representative of the Secretary inspected Southern's Hayne Shop in Spartanburg, South Carolina, where Southern's employees maintain and repair Southern's rolling stock. The Secretary subsequently issued two citations alleging several "non-serious" violations of OSHA regulations and ordering that the violations be eliminated within specified periods, and proposed that a penalty of $270 be assessed. Southern duly appealed the citations and penalties to the Occupational Safety and Health Review Commission.

Before the Commission's administrative law judge, Southern and the Secretary stipulated that the physical conditions alleged in the citations did in fact exist. However, Southern contended that the exercise of separate statutory authority by the Federal Railroad Administration ("FRA") had been sufficient, under § 4(b)(1) of OSHA, to exempt the railroad industry in general, and railroad maintenance and repair shops in particular, from the application of standards promulgated by the Secretary under the authority of OSHA; and that accordingly the Commission lacked jurisdiction over Southern, Southern's employees, and the subject matter of the administrative proceeding.

The Commission's administrative law judge, concluding that § 4(b)(1) did not confer an exemption, affirmed the citations (App. pp. 15a-34a).

On review by the full Commission, the decision was affirmed by a two-to-one vote (App. pp. 35a-36a). The Commission relied on its contemporaneous decision involving the Southern Pacific Transportation Com-

pany (App. pp. 37a-62a).[1] In the *Southern Pacific* case, two members of the Commission, adopting the position urged by the Secretary, ruled that § 4(b)(1) applies only to "specific working conditions" (App. p. 41a). Under this formulation, a railroad industry employer would be required to comply with the Secretary's standard respecting a given hazard unless FRA had issued a standard of its own designed to protect employees against precisely the same hazard. The Commission's chairman, dissenting, would have ruled that FRA's regulatory activities had been sufficient to trigger an OSHA exemption for the entire railroad industry.

On appeal brought under § 11(a) of OSHA, 29 U.S.C. § 660(a), the court below affirmed. It rejected the Commission's hazard-by-hazard interpretation of the exemption contained in § 4(b)(1), ruling instead that the exemption is triggered with respect to an employee's "environmental area" whenever another agency "has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area" (App. p. 10a). It found, however, that under that interpretation of the exemption contained in § 4(b)(1) there was no exemption for Southern's alleged violations.

Southern's petition for rehearing and suggestion of rehearing *en banc,* based on errors in the court's analysis and on actions taken by the Federal Railroad Administration during the pendency of the case, were denied by the court in an order entered March 15, 1976 (App. p. 12a). Southern moved for reconsidera-

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[1] The *Southern Pacific* decision is currently under review before the Court of Appeals for the Fifth Circuit, No. 74-3981.

tion of the denial of rehearing, based on new FRA regulations published on the day rehearing was denied, which affected employee safety within the "environmental area" of the Hayne Shop. The court then requested briefs in response to the petition for rehearing, but subsequently denied Southern's motion for reconsideration by order entered June 23, 1976, stating that the court had addressed only "OSHA's regulatory powers at the time of the violation." (App. p. 13a).

The requirements that Southern pay a monetary penalty and abate the conditions found violative of OSHA were stayed by operation of the statute during the Commission proceedings and by order of the Commission during the pendency of the proceedings before the Court of Appeals. On June 24, 1976, that court stayed the issuance of its mandate pending Southern's application for a writ of certiorari. (App. p. 14a).

REASONS FOR GRANTING THE WRIT

1. The question involved in this case—the manner in which OSHA regulation is to yield to more specific regulation of the railroad industry by FRA—is a question that has assumed national importance, and one which can be resolved only by this Court. Petitions to review similar decisions of the Commission holding that OSHA applies to railroad facilities are now pending in the Fifth, Seventh, Eighth, and D.C. Circuits.[2] Until the issue is definitively resolved, cases

[2] The cases appealed under OSHA include Seaboard Coast Line R.R. v. Occupational Safety & Health Review Comm'n, 5th Cir., No. 74-3984; Southern Pacific Transp. Co. v. Occupational Safety & Health Review Comm'n, 5th Cir., No. 74-3981; Southern Pacific Transp. Co. v. Occupational Safety & Health Review Comm'n,

can be expected to multiply. Indeed, the Court has recognized the need that it define the boundaries between comprehensive federal regulatory programs. *Train* v. *Colorado Public Interest Research Group,* 44 U.S.L.W. 4717 (U.S. June 1, 1976).

2. Moreover, the decision by the court below appears to construe § 4(b)(1) in a manner contrary to the intent of Congress, and should not be permitted to stand as a precedent for decisions by other courts. The court below has erred not only in deciding that the exemption provided in § 4(b)(1) is not applicable in this case, but also in deciding the extent to which the exemption does apply and the extent to which OSHA remains applicable in the case of railroad safety. In creating a demarcation by "environmental area," the court has announced a principle that will, in the words of the Secretary of Labor, who is charged with OSHA enforcement, "inevitably engender multitudinous additional litigation."[3]

5th Cir., No. 75-4331; Union Pacific R.R. v. Secretary of Labor, 5th Cir., No. 75-1613; Chicago, M., St.P.&P. Ry. v. Occupational Safety & Health Review Comm'n, 7th Cir., No. 75-2112; Burlington Northern, Inc. v. Occupational Safety & Health Review Comm'n, 8th Cir., No. 75-1943; Baltimore & O.R.R. v. Occupational Safety & Health Review Comm'n, D.C. Cir., No. 75-2163; Seaboard Coast Line R.R. & Winston-Salem Southbound Ry. v. Occupational Safety & Health Review Comm'n, D.C. Cir., No. 75-2244. In addition, the Court of Appeals for the Ninth Circuit is presently considering an appeal by the Secretary of Labor from a district court order enjoining him from inspecting another railroad's maintenance shops. Dunlop v. Burlington Northern R.R., 395 F. Supp. 303 (D. Mont. 1975), *appeal docketed,* 9th Cir., No. 75-3184.

[3] Neither the Secretary nor the Commission sought rehearing of the decision of the court below. But in his response to Southern's petition for rehearing, the Secretary argued that the court's "environmental area" formulation is "essentially unworkable, since it creates rather than removes further uncertainty in this

First, as to the proper construction of § 4(b)(1). The purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." Section 2(b), 29 U.S.C. § 651(b). OSHA, however, was not enacted in a vacuum; it took its place among numerous prior acts directed toward the protection of safety and health in particular industries. In formulating OSHA, Congress was careful to provide that the new general program would yield to the more particularized regulations designed to suit the circumstances of specific industries. Hence § 4(b)(1)—"Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[4]

To be sure, some safety programs were to yield to OSHA authority. Section 4(b)(2), 29 U.S.C. § 653(b)(2), provides that standards under OSHA shall supercede standards issued under the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.*, and several other enumerated statutes, if the Secretary determines that his OSHA standards are "more effective"—presumably meaning more effective in accomplishing the purposes of OSHA. Significantly, regulatory authority under all of those statutes was already vested in the Secretary. In contrast, where another federal agency is

area" (Response at pp. 18-19); and that it will "inevitably engender multitudinous additional litigation" (*id.* at 15).

[4] Section 24(a), 29 U.S.C. § 673(a), likewise provides that OSHA statistical programs "shall not cover employments excluded by section 4 of the Act."

exercising its own statutory authority, Congress conferred no similar authority on the Secretary to judge the effectiveness of the other agency's program. Yet that is the power now claimed by the Secretary and apparently accorded him by the court below.

The importance of the exemption provision, and its purpose to avoid the result reached below, are exemplified in the legislative history. During the House debates, Representatives Perkins, Daniels and Erlenborn[5] engaged in a carefully constructed colloquy for this purpose:

> Mr. PERKINS. . . . [*A*]*ll of these various legislative acts as railway safety and mine safety are specifically exempted under section 22(b).*[6]

[5] Representative Perkins was chairman of the House Education and Labor Committee; Representative Daniels was chairman of that committee's select subcommittee on labor; Representative Erlenborn was a member of the subcommittee and of the conference committee. Their views are entitled to be given great weight in the statute's construction. *See* United States v. Dickerson, 310 U.S. 554 (1940); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Galvan v. Press, 347 U.S. 522 (1954); Train v. Colorado Public Interest Research Group, 44 U.S.L.W. 4717 (U.S. June 1, 1976). The immediately succeeding portions of the Perkins-Daniels-Erlenborn colloquy, not quoted here, have been specifically recognized as an aid in the construction of § 4(b)(1). *See* Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975) (holding, as argued by the Secretary, that by operation of § 4(b)(1), the Environmental Protection Agency had acquired exclusive jurisdiction over farm worker exposure to pesticides).

[6] The bill under consideration was H.R. 16785, 91st Cong., 1st Sess. (1969); its exempting provision, § 22(b), then provided:

> Nothing in section 5 of this Act [duties of employers] shall apply to working conditions of employees with respect to whom any Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Mr. ERLENBORN. . . . I would like to engage in a colloquy . . . as to the interpretation of this language so there will not be any question as to what it means.

Is it your understanding that present Federal laws providing authority to the executive agency to prescribe health and safety standards that are being exercised *will then exempt that industry from the coverage of this act?*

Mr. DANIELS of New Jersey. *All Federal agencies which are covered by the health and safety laws will be exempt from this act—with just one exception. That is the construction industry.* . . .

* * *

Mr. ERLENBORN. I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised.

Let me ask this question.

If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; *does that then at the time it is exercised exempt an industry?*

Mr. DANIELS of New Jersey. At the time that that authority is exercised, *that industry will be exempt.*

Mr. ERLENBORN. So this does have a prospective effect. In other words, we are not going to interpret this language only as though it were being interpreted as to conditions that exist on the day it becomes law, but it will have a prospective effect and *the future exercise of authority will then exempt an industry from coverage under this law?*

Mr. DANIELS of New Jersey. The gentleman is absolutely correct.

116 *Cong. Rec.* 38381 (1970) (emphasis added).

The court below sought to avoid all of this by denying that the federal agency responsible for railroad safety—the Federal Railroad Administration—had "exercised" its statutory authority so far as concerned Southern's maintenance and repair shop. The ruling is belied not only by more than eighty years of statutory and regulatory action relating to railroads, but also by FRA's more recent "exercises" of its authority.

Federal concern with railroad safety began with the Safety Appliance Act of 1893, 45 U.S.C. §§ 1-5, prescribing standards for the installation of power brakes, automatic couplers, and standard draw bars on railroad rolling stock. Subsequent railroad safety legislation dealt with railroad rolling stock, signals, track, and the conditions of railroad industry employment.[7] Pursuant to the Accident Reports Act of 1910, as amended, 45 U.S.C. §§ 38-43, FRA receives reports with respect to virtually all occupational injuries and illnesses in the railroad industry. FRA's regulations implement its statutory responsibilities. *See generally* 49 C.F.R. Chapter II.[8]

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[7] This legislation included the Safety Appliance Act of 1903, 45 U.S.C. §§ 8-10; the Safety Appliance Act of 1910, 45 U.S.C. §§ 11-16; the Power or Train Brakes Safety Appliance Act of 1958, codified as the last portion of 45 U.S.C. § 9; the Locomotive Inspection Act, 45 U.S.C. §§ 23, 30; the Hours of Service Act, 45 U.S.C. §§ 61-64; and the Signal Inspection Act, 45 U.S.C. § 35.

[8] FRA was created as part of the Department of Transportation, which acquired the jurisdiction over railroad safety previously exercised by the Interstate Commerce Commission. Department of Transportation Act, 80 Stat. 931 (1966). The Administrator of the FRA issues and enforces railroad safety regulations pursuant to a delegation of authority from the Secretary of Transportation. 49 C.F.R. § 1.49.

Federal railroad safety legislation culminated in the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 *et seq.*, which became law on October 16, 1970, just over two months prior to the passage of OSHA. Under this statute, the Secretary of Transportation is required to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 45 U.S.C. § 431(a). FRA has exercised its Federal Railroad Safety Act authority in several ways. In November 1974, FRA required all railroads to file copies of their operating rules and to test their employees' compliance with them. 39 Fed. Reg. 41175. In December 1974, FRA completely revised its accident reporting and recordkeeping regulations, set forth in 49 C.F.R. Part 225, for the purpose of permitting the agency "to carry out effectively its regulatory responsibilities under the Federal Railroad Safety Act of 1970 and the Accident Reports Act." 49 C.F.R. § 225.1, 39 Fed. Reg. 43222.[9] Then, in March 1975, FRA issued an Advance Notice of Proposed Rulemaking, 40 Fed. Reg. 10693 (Mar. 7, 1975), in which the agency proposed to prescribe detailed railroad occupational safety and health standards under the authority of the Federal Railroad Safety Act; the first groups of these standards have recently been announced in a notice of proposed rule-

[9] FRA believed that, under § 4(b)(1) of OSHA, the railroad industry was previously exempted from the Secretary of Labor's OSHA reporting and recordkeeping rules because accident reporting and recordkeeping in the railroad industry was governed by the Accident Reports Act and by FRA's own regulations. 39 Fed. Reg. 25955 (July 15, 1974). The Commission agreed in the *Southern Pacific* case (App. pp. 41a-43a); the Secretary of Labor filed but later withdrew a petition for review of that decision (5th Cir., No. 75-1091), and no longer asserts OSHA authority to require reporting and recordkeeping in the railroad industry.

making. 41 Fed. Reg. 29153 (July 15, 1976). FRA has also issued regulations prescribing the use of blue flag and light signals to protect employees working on or about rolling stock. 41 Fed. Reg. 10904 (Mar. 15, 1976).[10]

There can be no doubt, and it is not in dispute, that FRA has "exercised" its authority with respect to safety in railroad operations. Nor should there be doubt that it has also exercised its authority with respect to safety in railroad shops such as those here involved. Not only do FRA regulations concerning accident reporting and recordkeeping apply to any injury that might have occurred—but did not—as a result of any of the conditions for which Southern was cited in the present case, but also FRA's advance notice of proposed rulemaking of March 1975, which has already been followed by the issuance of proposed rules, and which will inevitably culminate in detailed safety regulations for maintentance shops," is precisely the "exercise" which Congress intended in § 4(b)(1). In the words of Representative Steiger, a co-sponsor of OSHA, "[i]t is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority even though the action might be at the

[10] Among its other actions, FRA has also proposed the issuance of rules designed to protect train crews, 41 Fed. Reg. 13369 (Mar. 30, 1976) and maintenance-of-way-and-structure employees, 40 Fed. Reg. 17265 (Apr. 18, 1975) (advance notice).

[11] The court below erroneously asserted that the regulations proposed in the advance notice would not apply to the Southern maintenance shops here involved (App. pp. 10a-11a). In fact, Southern's shops are "maintenance facilities located on or adjacent to the roadway, yards and terminals" to which the proposed regulations were, *inter alia*, to apply. 40 Fed. Reg. 10693.

formative stage of regulations or enforcement." 116 *Cong. Rec.* 38373 (1970).[12] Moreover, FRA has issued safety rules, now in effect, that require employers to take specified measures to protect employees against certain hazards. *See, e.g.,* 41 Fed. Reg. 10904 (Mar. 15, 1976) (blue signal rules). Some of these rules

[12] The court below erroneously referred to the March, 1975 advance notice as a "speculative announcement" (App. p. 11a). FRA considers on the contrary that its issuance of an advance notice of proposed rulemaking begins a rulemaking proceeding. For example, in publishing new proposed employee safety regulations, FRA took note of comments received in response to its earlier *advance notice* and stated the agency's appreciation for the commentators' "participation in this rulemaking proceeding." 40 Fed. Reg. 30495 (July 21, 1975). *See also* FEDERAL RAILROAD ADMINISTRATION, A COMPREHENSIVE RAILROAD SAFETY REPORT (REPORT TO CONGRESS) at 48 (1976), in which FRA describes its rulemaking process as commencing with the issuance of an advance notice. FRA's procedural rules are set forth in 49 C.F.R. Part 211, 39 Fed. Reg. 41744 (Dec. 2, 1974).

The fact that an advance notice is not employed in every case does not make such a notice any less a part of the rulemaking process when it is employed. An advance notice of proposed rulemaking issued by a Department of Transportation agency has been recognized as part of the "procedures" for implementing statutory authority. Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 n.21 (1973). Such a DOT notice has also been expressly recognized as the beginning of "[t]he rulemaking process," National Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31, 34 n.10 (D.C. Cir. 1974). And in National Air Carrier Ass'n v. CAB, 442 F.2d 862, 874 n.10 (D.C. Cir. 1971), the court took note of "the pendency of [a] rule making proceeding," brought into being by an advance notice of proposed rulemaking. The Secretary of Labor also makes use of the advance notice in the exercise of his OSHA authority. *See, e.g.,* 41 Fed. Reg. 18430 (May 4, 1976).

FRA has recently moved to the next step in its program of prescribing standards for all areas of railroad employment safety, issuing proposed rules for "means of egress," "general environmental controls," and "fire protection." 41 Fed. Reg. 29153 (July 15, 1976).

apply to working conditions in Southern's Hayne Shop.

Second, as to the construction of § 4(b)(1) announced by the court below. Rejecting the contention of the Secretary that his OSHA authority extends to "every minute detail of the working environment not covered by a specific standard or regulation of the other Federal agency" (App. p. 8a)—the so-called "nook-and-cranny" theory of OSHA enforcement—the court devised the theory of applying the exemption on the basis of an "environmental area in which an employee customarily goes about his daily tasks": if safety in an "environmental area" is affected by the exercise of authority by another Federal agency, OSHA will not apply in that area. As indicated above, such a standard for OSHA jurisdiction creates the potential for endless litigation and should not be allowed to stand. No one knows what constitutes an "environmental area," and the phrase is not further defined by the court below. Southern agrees with the Secretary that the interpretation of § 4(b)(1) by the court below is "essentially unworkable",[13] and that the court's failure to define the exemption more precisely "will create chaos for both the Secretary and employers."[14]

Finally, as to the time when the authority of FRA need be exercised. In denying Southern's motion for reconsideration of denial of rehearing, the court below sought to avoid the effect of the recent FRA regulatory activities set out above by stating that "it addressed itself to OSHA's regulatory powers at the

[13] Response to Southern's Petition for Rehearing, pp. 18-19.

[14] *Id.* at 14-15.

time of the violation" and gave no consideration to the present situation (App. p. 13a). This leaves the parties in limbo. OSHA procedures contemplate administrative proceedings following the first stage of administrative and judicial review.

In the present instance, the Secretary originally directed that the asserted violations be corrected not later than April, 1974 (App. pp. 16a-17a). The abatement period was tolled during the pendency of the administrative proceeding by operation of §§ 10(b) and 17(d) of OSHA, 29 U.S.C. §§ 659(b) and 666(d), and because both the Commission and the Court of Appeals have stayed their orders, the periods have yet to begin. However, after a citation has been approved by the Commission and that agency's order is in turn either judicially affirmed or not appealed, the employer is required to comply with the terms for abatement as originally prescribed in the citation. Very heavy penalties—as much as $1,000 per day per violation—may be imposed if the violations are uncorrected following expiration of the abatement period. OSHA, § 17(d), *supra*. The Secretary necessarily claims authority to reinspect the employer's premises to determine whether the original abatement requirements have been complied with. The present validity of the original citations issued in this case therefore depends on the present scope of the exemption.[15]

[15] The Secretary has taken the position that he is without authority to reinspect after the exemption in § 4(b)(1) has been triggered. Southern recently petitioned the Court of Appeals for the Sixth Circuit for review of another Commission order affirming a citation issued with respect to another of Southern's facilities. While that petition was pending, FRA issued new regulations which even under the Secretary's restrictive view preempted OSHA regulation of the particular hazard in question. Thereafter,

It has long been established that where there is a material change of circumstances following issuance of an order by an administrative agency, an appellate court reviewing that order may either render its decision on the basis of the new circumstances or, alternatively, remand the matter to the agency for further consideration. *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947).[16] By doing neither, the court has condemned Southern, the Sec-

Southern and the Secretary, without objection by the Commission, jointly moved for withdrawal of the petition for review, representing to the court that "by operation of Section 4(b)(1) of the Act the Secretary is now without authority to cite Southern for nonabatement of the . . . hazard, propose further penalties for such nonabatement, or take other statutory steps to assure the . . . hazard's correction under [OSHA]." Southern Ry. v. Occupational Safety & Health Review Comm'n, 6th Cir., No. 75-2493 (*petition withdrawn*, June 4, 1976).

FRA's recent rulemaking action, 41 Fed. Reg. 29153 (July 15, 1976), proposes the adoption of regulations that will govern means of egress, general housekeeping, and fire protection in the Hayne Shop. The regulations to be adopted by FRA apply, *inter alia*, to some of those conditions (pertaining to washing and toilet facilities) for which Southern was cited in the present case; even the Secretary should recognize a preemption of his jurisdiction with respect to those conditions. It is not clear whether the Secretary and the Court of Appeals will now acknowledge a broader exemption, although their previous reluctance to accord recognition to an *advance notice* of proposed rulemaking, *supra* note 12, would not seem to prevent their recognizing FRA's recent action as an "exercise" adequate under § 4(b)(1) of OSHA.

[16] This doctrine stems from the principle that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." United States v. Schooner Peggy, 1 Cranch (5 U.S.) 103, 110 (1801) (Marshall, C.J.); *see also* Gulf, C. & S.F. Ry. v. Dennis, 224 U.S. 503, 506 (1912); Wabash Ry. v. Public Service Comm'n, 273 U.S. 126, 130-31 (1927); Bell v. Maryland, 378 U.S. 226, 238-39 (1964).

retary, and the Commission to a renewed series of administrative and judicial proceedings premised on the 1973 citations with the possible consequence that Southern will be able to assert a present exemption as a defense to the abatement requirements of those citations only by risking liability to the very heavy cumulative monetary penalties which OSHA prescribes for nonabatement.

CONCLUSION

Whether OSHA has any application to the railroad industry is unquestionably a matter of great national importance, and one that warrants a definitive resolution. The formulation offered by the court below is neither correct nor administratively workable, and indeed leaves the basic issue unresolved. We submit, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1055

SOUTHERN RAILWAY COMPANY, Petitioner

versus

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION and PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, Respondents

AFL-CIO and UNITED TRANSPORTATION UNION, Intervenors.

On Petition for Review of an Order of the Occupational Safety and Health Commission.

Argued July 10, 1975 Decided Feb. 9, 1976

Before CRAVEN, BUTZNER and FIELD, Circuit Judges.

Charles A. Horsky, (Jeffrey S. Berlin; Covington and Burling, Edgar A. Neely, Jr., Richard K. Hines, V; Neely, Freeman and Hawkins, and William P. Stallsmith, Jr., on brief) for Petitioner; (William M. Moloney, John B. Norton, John F. Kay, Jr.; Mays, Valentine, Davenport on brief) for Amicus Curiae for the Association of American Railroads; Benjamin W. Mintz, Associate So-

licitor for Occupational Safety and Health, United States Department of Labor, (William J. Kilberg, Solicitor of Labor, Michael H. Levin, Counsel for Appellate Litigation, Allen H. Feldman, Assistant Counsel for Appellate Litigation, and Dennis K. Kade, Attorney, United States Department of Justice on brief) for Respondents; Lawrence M. Mann, (Bernstein, Alper, Schoene and Friedman on brief) for Intervenors.

FIELD, Circuit Judge:

This case is before the court upon a petition for review of a final order of the Occupational Safety and Health Review Commission (Commission) entered November 26, 1974, against Southern Railway Company (Southern). This court has jurisdiction under Section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA/Act).[1]

The facts are undisputed. The petitioner, Southern, a Virginia corporation, operates an interstate common carrier railroad system which includes a facility for maintenance and repair of rolling stock known as the Hayne Shop in Spartanburg, South Carolina. In October of 1973, an OSHA compliance officer made a routine inspection of the facility pursuant to 29 U.S.C. § 657(a), and on November 2, 1973, the Secretary of Labor (Secretary) cited Southern for ten "non-serious" violations of standards promulgated by the Secretary under the authority of OSHA, proposing certain penalties and requiring abatement of the alleged violations by April of 1974. The citations were affirmed by an administrative law judge and his decision was upheld by a split Commission.[2]

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[1] 84 Stat. 1590, 29 U.S.C. § 651, *et seq.*

[2] Secretary of Labor v. Southern Railway Company, OSHRC Docket No. 5566 (November 26, 1974).

Southern admits that it has not complied with the OSHA standards and regulations alleged to have been violated, but takes the position that it is exempt from compliance by Section 4 (b)(1) of the Act[3] which reads in pertinent part as follows:

> "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Southern contends that the exemption is operative because the Secretary of Transportation, acting through the Federal Railroad Administration (FRA), has exercised his authority pursuant to the Federal Railway Safety Act of 1970, 45 U.S.C. § 421, *et seq.*, and earlier railway safety acts[4] to promulgate and enforce safety regulations affecting the working conditions of railway employees. Conceding that FRA has not exercised its authority to regulate employee safety in railway shop and repair facilities such as the Hayne Shop, Southern urges that, nonetheless, there has been a sufficient exercise of the regulatory authority to exempt the working conditions of all employees in the railway industry from the OSHA standards. The Secretary admits that under the Federal Safety Act the FRA has authority to regulate all areas[5] of employee safety for the railway

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[3] 29 U.S.C. § 653 (b)(1).

[4] Some of the Acts of Congress relied upon by Southern are:

The Safety Appliance Acts, 45 U.S.C. §§ 1-14. The Signal Inspection Act, 45 U.S.C. § 26. Train, Brakes Safety Appliance Act, 45 U.S.C. § 9. Hours of Service Act, 45 U.S.C. § 61, *et seq.* Rail Passenger Safety Act, 45 U.S.C. § 502, *et seq.*

[5] 45 U.S.C. § 431(a) reads in part:

"The Secretary of Transportation * * * shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and

industry, but contends that Section 4(b)(1) exempts only those areas of railway employee safety in which FRA has expressly exercised its authority. The Commission, in essence, adopted the Secretary's view.[6]

While Section 4 (b)(1) may not be entirely self-defining, it is clear that the exemption applies only when another Federal agency has actually exercised its statutory authority. It does not apply where such an agency has regulatory authority but has failed to exercise it. This is clear not only from the statutory language but from the legislative history as well. Earlier versions of the legislation had provided that the mere existence of statutory authority in another Federal agency was sufficient to invoke the exemption, but they were rejected by the Congress. *See* Legislative History of the Occupational Safety and Health Act of 1970, pp. 62, 620, 671, 710 (Committee Print, 1971), (Legislative History).[7] That actual exercise of the statutory authority rather than its mere existence was contemplated is clearly evident from the following colloquy during debate on the Act in the House of Representatives:

"MR. ERLENBORN.

• • • •

(2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety."

[6] The Commission majority rejected Southern's contention for an industry-wide exemption based upon its decision in the case of Secretary of Labor v. Southern Pacific Transportation Company, OSHRC Docket No. 1348, 2 OSHC 1313 (1974), *pending on review sub nom*, Southern Trans. Co. v. OSHRC and Brennan (CA. 5, Nos. 74-3981 and 75-1091).

[7] The language of H. R. 13373 (Ayres Bill) is representative:

"Nothing in this Act shall authorize the • • • Secretary to regulate, or shall apply to working conditions of employees with respect to whom other Federal agencies, • • • *have statutory authority* to prescribe or enforce standards or regulations affecting occupational safety or health. (Emphasis added). Legislative History, p. 710.

If there is authority under the Federal law, but is has [not] yet been put into effect and it is not being exercised by the executive agency because they have no rules or regulations, then until they do adopt rules and regulations and exercise that authority—then this does apply; is that correct?

MR. DANIELS of New Jersey. Yes, that would be correct. The gentleman has placed his finger on the key word—and the key word is 'exercise.'

If an agency fails to pursue the law and exercise the authority that has been given to it, then this law will step in.

MR. ERLENBORN. In other words, the mere existence of statutory authority does not exempt an industry? It is the exercise of that authority pursuant to the statute that does exempt it; is that correct?

MR. DANIELS of New Jersey. That is correct."

Legislative History, p. 1019.

With respect to Southern's argument that the exercise of authority by the FRA in substantial areas of employee safety exempted the entire industry from OSHA standards, the specific statutory language is less clear. Both the Secretary and Southern have referred us to the Legislative History as providing support for their respective positions, but we find nothing definitive bearing upon the question before us.[8]

In addition to his references to the Legislative History, the Secretary urges that the Commission's construction of the statute should be virtually dispositive. In advancing this argument he places primary reliance upon *Udall* v. *Tallman*, 380 U.S.1, 16 (1965), where the Court stated:

[8] *See, e.g.*, Legislative History at 162, 997, 1223; cf., pp. 1019, 1020, 1037.

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' • • • 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" '." (Citations omitted).

This principle of *Udall* was recognized by us in *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255(1974), where we accepted the Commission's definition of the term "employer" as used in Section 5(a) of the Act.[9] Noting that alternative definitions were equally consistent with the objectives of the Act, we stated: "It follows that since Congress has chosen the Occupational Safety and Health Review Commission as the enforcing agency, the choice between these alternatives is appropriately committed to it." *Id.*, at 1261. We observed that deference to the Commission's construction was appropriate not only because of its expertise but because "Congress intended that this agency would have the normal complement of adjudicatory powers possessed by traditional administrative agencies." *Id.*, at 1262.

While it is true that *Gilles & Cotting* was addressed to the "day to day economic realities" of OSHA's implementation rather than the bald question of statutory construction which presently confronts us, its rationale is highly persuasive and, in itself, might well tip the scale in favor

[9] 29 U.S.C. § 654(a).

of the Secretary's position. However, we find it unnecessary to rely upon either the sparse legislative history relative to Section 4 (b)(1) or the Commission's interpretation, for in our opinion a fair reading of the exemptive provision in the light of the statutory objectives requires that the Commission's construction of the statute be affirmed.

OSHA was enacted in response to an appalling record of death and disability in our industrial environment, and it was the clear intendment of Congress to meet the problem with broad and, hopefully, effective legislation. The declared purpose of the Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). "Since the statute does not, on its face, provide an answer to the specific question [before us] • • • reference to the statutory purpose behind the Act is especially necessary to arrive at an interpretation of the statute consistent with the objectives Congress sought to achieve through this legislation." [10] Additionally the scope of the Congressional objective requires that this "[r]emedial social legislation • • • be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed." [11] Accordingly, the exemptive statute should appropriately be construed to achieve the maximum protection for the industrial workers of the Nation.

In our opinion the industry-wide exemption urged upon us by Southern would fly in the face of these principles and objectives. The safety regulations of the Department of Transportation are confined almost exclusively to those areas of the railway industry which affect over-the-road

[10] Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4 Cir. 1974).

[11] Wirtz v. Ti Ti Peat Humus Company, 373 F.2d 209, 212 (4 Cir. 1967).

operations such as locomotives, rolling stock, signal installations, road beds and related facilities.[12] While the regulatory program in these areas reflects a concern for the safety of the employees, it is directed primarily toward the general safety of transportation operations. On the other hand, the Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities. To read the exemptive statute in a manner which would leave thousands of workers in these non-operational areas of the railway industry exposed to unregulated industrial hazards would, in our opinion, utterly frustrate the legislative purpose.

Southern suggests that a rejection of its position will, of necessity, constitute an acceptance on our part of the "nook and cranny theory of safety regulation"[13] under which the Secretary's jurisdiction would extend into every minute detail of the working environment not covered by a specific standard or regulation of the other Federal agency. While some intra-agency memoranda[14] indicate that the Secretary of Labor has espoused such a theory, the decisions of the Commission have evinced a somewhat ambivalent attitude on the question.[15] In any event, we do

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[12] Southern appears to concede that the railway safety statutes referred to in footnote 4, *supra*, are directed solely to the transportation operations of the industry.

[13] This phrase was used by Chairman Moran in his dissenting opinion in Secretary of Labor v. Southern Pacific Transportation Company, n.6, *supra*.

[14] *See, e.g.*, Memorandum of the General Counsel for the Department of Transportation re: "Interpretation of section 4 (b)(1) of the Occupational Safety and Health Act of 1970." Occupational Safety & Health Reporter, Vol. 4, No. 35 (January 30, 1975), pp. 1072-74. (Bureau of National Affairs, Inc.)

[15] *See* Secretary v. Mushroom Transportation Co., Inc., OSAHRC Docket No. 1588, 5 OSAHRC Rep. 64 (1973). *Cf.*, Secretary v. Fineberg Packing Co., Inc., OSAHRC Docket No. 61, 7 OSAHRC Rep. 405 (1974).

not think our choice of alternatives is as limited as Southern would suggest.

The crux of the controversy is the phrase "working conditions" in Section 4 (b)(1). The Secretary contends that this phrase means "particular, discrete hazards" encountered by an employee in the course of his job activities.[16] Southern, on the other hand, insists that the term means "the aggregate of circumstances of the employment relationship—that is, the employment itself."[17]

We think both of the parties are a bit wide of the mark. Southern and the Secretary each relies upon *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), where the Court, in considering the meaning of the term "working conditions" as used in the Equal Pay Act of 1963,[18] stated:

> "• • • the element of working conditions encompasses two subfactors: 'surroundings' and 'hazards'. 'Surroundings' measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. 'Hazards' takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of 'working conditions' is • • • well accepted across a wide range of American Industry." (Footnotes omitted) *Id.*, at 202.

We think this aggregate of "surroundings" and "hazards" contemplates an area broader in its contours than the "particular, discrete hazards" advanced by the Secretary, but something less than the employment relationship in its entirety advocated by Southern. The Act was intended both to provide comprehensive coverage to the

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[16] Secretary's Brief, p. 18.

[17] Petitioner's Brief, p. 9.

[18] 29 U.S.C. § 206 (d)(1).

workers across the country and to avoid duplication of regulatory effort by the various Federal agencies. In light of these dual objectives, and drawing upon the *Corning* definition, we are of the opinion that the term "working conditions" as used in Section 4 (b)(1) means the environmental area in which an employee customarily goes about his daily tasks. We are further of the opinion that when an agency has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area,[19] the authority of the Secretary of Labor in that area is foreclosed. Such a construction, we think, avoids the confusion and duplication of effort that Section 4 (b)(1) of the Act was designed to prevent, and is consonant with the general statutory purpose.

One further point requires our attention. Following the Commission's decision in this case, the FRA on March 3, 1975, issued an Advance Notice of Proposed Rule Making,[20] which Southern asserts was an exercise of statutory authority sufficient, in itself, to trigger the exemption under Section 4 (b)(1). Aside from the question of whether such an advance notice constitutes rule making under the Administrative Procedure Act, 5 U.S.C. § 551 (5),[21] it appears to us that the areas of the railway industry to be covered

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[19] Under OSHA the term "standard" is defined as follows:

> "(8) The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 653.

The Commission however, has recognized that "Section 4 (b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Secretary v. Mushroom Transportation Co., Inc., n. 15, *supra*, at 67.

[20] 40 Fed. Reg. 10693 (March 7, 1975).

[21] *See* Secretary v. Chesapeake & Ohio Railway Co., OSHRC Docket No. 10334, 1974-75, OSHD ¶ 19,581 (CCH).

by the proposed rules will be confined to those which are the subject of regulations presently in effect.[22] Exclusion of a substantial number of employees from coverage is recognized by a specific disclaimer in the notice:

> "Even though FRA has broad authority to regulate railroad occupational safety and health, it does not now propose to adopt railroad occupational safety standards for all railroad working conditions or work places. FRA will adopt, as necessary, standards regarding occupational safety and health conditions of railroad employees whose work place or activities are related to the operation of the rail transportation system."
>
> 40 Fed. Reg. 10693 (March 7, 1975).

We agree with the Secretary that the denial of OSHA's protection to numerous workers upon the basis of this speculative announcement would be inappropriate.

For the reasons stated herein the Commission's order is affirmed.

AFFIRMED.

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[22] "The working conditions and work places to be covered by the railroad occupational safety and health standards refer to the specific areas of the railroad industry which will be covered by regulations in the interest of safety and which directly affect railroad transportation operations. Areas covered will include rail roadways, rolling stock, yards and terminals and repair and maintenance facilities located on or adjacent to the roadway, yards and terminals. The proposed regulations would supplement the existing FRA safety regulations." 40 Fed. Reg. 10693, n. 20, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1055

SOUTHERN RAILWAY COMPANY, Petitioner,

versus

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION and PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, Respondents,

AFL-CIO and UNITED TRANSPORTATION UNION, Intervenors.

On Petition for Review of an Order of the Occupational Safety and Health Commission.

Order

Upon consideration of the petition for rehearing and suggestion for rehearing in banc filed on behalf of Southern Railway Company;

Now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

/s/ JOHN A. FIELD, JR.
United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk
By /s/ E. BELTON
Deputy Clerk

FILED
MAR 15 1976
William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1055

SOUTHERN RAILWAY COMPANY, Petitioner,

versus

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION and PETER J. BRENNAN, Secretary of Labor, Respondents,

AFL-CIO and UNITED TRANSPORTATION UNION, Intervenors.

On Petition for Review of an Order of the Occupational Safety and Health Commission.

Order

Upon consideration of Southern Railway Company's motion for reconsideration of denial of rehearing and rehearing in banc, and the replies and responses thereto, the court notes that it addressed itself to OSHA's regulatory powers at the time of the violation in this case and has given no consideration to the situation after the issuance or the effective date of the new Federal Railroad Administration regulations. It is, therefore, with the concurrence of Judge Craven and Judge Butzner, ORDERED that the motion for reconsideration be and it is hereby denied.

/s/ JOHN A. FIELD, JR.
Senior United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk
By /s/ FAYE L. SMITH
Deputy Clerk

FILED
JUN 23 1976
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1055

SOUTHERN RAILWAY COMPANY, Petitioner,
ASSOCIATION OF AMERICA RAILROADS, Amicus Curiae,

versus

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION and PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, Respondents.

AFL-CIO and UNITED TRANSPORTATION UNION, Intervenors.

Order

Upon motion of the petitioner, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the petitioner in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

For the Court—by Direction.

/s/ WILLIAM K. SLATE, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk
By /s/ E. BELTON
Deputy Clerk

FILED
JUN 24 1976
U.S. Court of Appeals
Fourth Circuit

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, NE.
ATLANTA, GEORGIA 30309

OSHRC Docket No. 5566

SECRETARY OF LABOR, Complainant,

v.

SOUTHERN RAILWAY COMPANY, Respondent.

Decision and Order

Appearances: Anthony B. Cuviello, Esquire, Atlanta, Georgia, for complainant

Edgar A. Neely, Jr., Esquire, Atlanta, Georgia, and William P. Stallsmith, Jr., Esquire, Washington, D.C. for respondent.

STATEMENT OF CASE

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, 84 Stat. 1390 (hereinafter referred to as the Act). Respondent seeks review of two citations issued to it on November 2, 1973. Review is also sought by respondent of the penalties proposed, pursuant to section 10(a) of the Act, for certain of the violations.

As the result of an inspection conducted on October 9 and 10, 1973, of a repair facility maintained under the operation or control of the respondent in Spartanburg, S.C., respondent was issued two citations for non-serious violations and two notifications of proposed penalty on November 2, 1973. One of the citations, for convenience purposes hereinafter referred to as "A", alleges that re-

spondent violated section 5(a)(2) of the Act by its failure to comply with two (2) standards promulgated pursuant to section 6 of the Act. The other citation, for convenience hereinafter referred to as citation "B", alleges a violation of eight (8) standards.

The respondent, by letter dated November 23, 1973, timely [1] notified complainant that it wished to contest the citations and proposed penalties. Respondent further advised that it maintains that section 4(b)(1) of the Act exempts it from standards promulgated by the Secretary of Labor pursuant to the Act.

The citations allege a total of ten (10) violations. The alleged violations, abatement dates, penalties proposed and the descriptions of the alleged violations as set forth in the citations are as follows:

Citation A (Abatement date for these items specified as no later than April 30, 1974)

1. *29 CFR 1910.309(a)* Penalty Proposed: $45.00

   Failure to provide approved (explosion-proof) lighting fixtures in the spray paint area of the coach paint shop.

2. *29 CFR 1910.93(a)(2)* Penalty Proposed: $60.00

   Subjecting employee performing electric welding in the blacksmith shop to airborne concentrations of

[1] Complainant filed a Motion To Dismiss Notice of Contest on December 20, 1973 (date received) on the grounds that the notice of contest was untimely. The motion was denied by the Commission's Motion Judge on January 10, 1974. Respondent received the citations and notifications of proposed penalty on November 5, 1973. The envelope bearing the notice of contest was postmarked November 28, 1973. Respondent submitted a copy of a certificate of mailing showing that the letter was mailed on November 26, 1973.

iron oxide fumes exceeding the 8-hour time weighted average given for the substance in table G-1 at the following location: second welding station left of aisle facing west.

Citation B (Abatement dates for first 7 items specified as no later than April 15, 1974. Item 8 was to be corrected no later than November 5, 1973.)

1. *29 CFR 1910.141(c)(1)(vii)* Penalty Proposed: None

   Failure to provide at least one lavatory located either in the toilet room or adjacent thereto for the four toilet facilities provided in the coach paint shop at ground floor.

2. *29 CFR 1910.141(d)(2)(ii)* Penalty Proposed: None

   Failure to provide the multiple use lavatory at the second floor level of the coach paint shop with hot and cold running water, or tepid running water.

3. *29 CFR 1910.141(d)(1)* Penalty Proposed: None

   Failure to maintain washing facilities in a sanitary condition at the floor in the shower room at second floor level in the coach paint shop.

4. *29 CFR 1910.141(c)(1)(i)* Penalty Proposed: None

   Failure to provide a room or rooms for the four toilet facilities that were provided in compartments in the coach paint shop and for the toilet facilities in the blacksmith shop.

5. *29 CFR 1910.27(b)(1)* Penalty Proposed: $40.00

   Failure to comply with the specific features of design requirements in minimum diameter of rungs, in tag distance between rungs and in the minimum clear length of rungs on thirty fixed metal ladders in the coach paint shop and on twenty fixed metal ladders in the coach shop.

6. *29 CFR 1910.28(a)(9)* Penalty Proposed: $40.00

> Exceeded the maximum permissible spans for 2 x 9 inch or wider planks on eleven scaffolds in the coach paint shop and on ten scaffolds in the coach shop.

7. *29 CFR 1910.28(a)(13)* Penalty Proposed: $30.00

> Exceeded the permissible length scaffold planks shall extend over their end supports on ten scaffolds in the coach paint shop.

8. *29 CFR 1910.252(e)(2)(iii)* Penalty Proposed: $55.00

> Failure to protect workers or other persons adjacent to the welding areas from the rays by noncombustible or flameproof shields or screens or by requiring them to wear appropriate goggles.

Respondent's answer admits the two alleged violations set forth in citation "A" and items 1, 3, 5, 6, 7 and 8 of citation B. Respondent denies that there was any violation of items 2 (29 CFR 1910.141(d)(2)(ii)) and 4 (29 CFR 1910.141(c)(1)(i)) of citation B. (Par. IV, Answer)

On February 25, 1974, the parties filed a stipulation of the facts in this case with the following understanding: (Par. I of Stip.)

> This stipulation is submitted for the purpose of constituting the record, in lieu of hearing, upon which the Commission may reach final decision on all questions, including jurisdictional, constitutional, and the merits in this cause.

As a result of the stipulation, respondent's concession of item 1 of citation "B" is somewhat clouded [2] and for purposes of this decision the concession in the answer has been

[2] See Par. XII of Stipulation.

disregarded. Complainant concedes that there was no violation of item 2 (29 CFR 1910.141(d)(2)(ii)) of citation "B". (Par. XIII, Stip.) Thus, in addition to the question of jurisdiction arising under section 4(b)(1), respondent contests the merits of items 1 and 4 of citation B, the reasonableness of all abatement dates and penalties proposed.

Jurisdiction and Issues

Respondent concedes that it is an interstate rail carrier engaged in a business affecting commerce within the meaning of the Act. (Par. II, Complaint and Answer; Par. IV, Stipulation) It denies that it is subject to the provisions of the Act and submits that neither the Department of Labor nor this Commission has jurisdiction of this proceeding. This denial is premised on the belief that section 4(b)(1) of the Act exempts it from the provisions of the Act. (Par. V, Stip.)

The following issues have been raised by the parties in this proceeding:

1. Does section 4(b)(1) of the Act exempt respondent from the standards promulgated by complainant pursuant to section 6 of the Act?

2. Did respondent violate section 5(a)(2) of the Act by its failure to comply with the standards published at 29 CFR 1910.141(c)(1)(vii) and 29 CFR 1910.141(c)(1)(i)?

3. What are reasonable abatement dates for all conceded violations and any other violations that might be determined?

4. What penalties, if any, should be assessed for any violations of the Act?

FINDINGS OF FACT

The evidence of record has been carefully considered and evaluated in its entirety. The facts hereinafter set forth are specifically determined in resolving the issues in this case.

1. Respondent, Southern Railway Company, is a railway corporation organized and existing under the laws of the State of Virginia. It is engaged in the operation of a common carrier interstate railroad system and maintains a maintenance and repair facility, known as the "Hayne Shop", in Spartanburg, South Carolina. (Par. IV, Stip.)

2. On October 9 and 10, 1973, the complainant, through a duly authorized representative, conducted an inspection of the "Hayne Shop" in Spartanburg, S.C. (Par. VII, Stip.)

3. Respondent had no toilet rooms housing its five toilet facilities provided on the first floor of the coach paint shop and one such facility in the blacksmith shop. The lavatories provided in the coach paint shop were not immediately adjacent to the toilet facilities. No females are employed in the coach paint shop or blacksmith shop and toilet facilities are used only by male employees. No females ever enter the coach paint shop or blacksmith shop. (Pars. XII, XV, Stip.)

4. The type of lighting fixtures in violation of item 1 (29 CFR 1910.309(a)) of citation "A" have been used at the Hayne Shop for at least thirty-five (35) years. During that time the spraying operations have been substantially the same as existed at the time of inspection. No lighting fixture has ever exploded and there has been no personal injury arising from the use of the lighting fixtures. (Par. X, Stip.)

5. The violation of item 2 (29 CFR 1910.93(a)(2)) of citation "A" has never resulted in any employee claim of sickness or injury even through the method used by respondent has been the same for many years. (Par. XI, Stip.)

6. The use of the ladders and scaffolds set forth in items 5, 6 and 7 of citation "B" have never resulted in any personal injury to employees. (Par. XVI, Stipulation)

7. Respondent does not presently require employees to wear goggles when in a place where arc welding is being accomplished. Welding shields are also not utilized at "Hayne Shop." Suitable goggles are made available to employees who ask for them and respondent encourages employees in the vicinity of arc welding operations to wear appropriate goggles. Respondent also makes arrangements to secure appropriate goggles with prescription lens for individual employees desiring them. (Par. XVII, Stip.)

8. Complainant took into account the following factors in determining his proposed penalties: (Par. XX, Stip.)

GRAVITY:

Probability of injury from condition found;

Severity of injury—type of care (First aid; doctor; hospitalization);

Extent—Percentage of occurrences.

ADJUSTMENT FACTOR:

Good Faith—Cooperation and overall safety consciousness;

Size—Total number of employees at workplace;

History of previous injuries, illnesses or violations.

ABATEMENT CREDIT:

A 50% credit was allowed in all instances.

9. Complainant's assessment of the gravity of the violations resulted in unadjusted penalties as specified by rating the gravity factors as indicated: (Par. XX and Ex. B, Stip.)

Citation	Item No.	Probability of Injury	Severity (care)	Extent of Violation	Unadjusted Penalty
A	1	Moderate	Doctor	15-50%	$150
A	2	High	Hospital	0-15%	200
B	1	Moderate	First Aid	0.15%	0
B	2	Low	Doctor	0-15%	0
B	3	Moderate	First Aid	0-15%	0
B	4	Low	First Aid	0-15%	0
B	5	Low	Doctor	50-90%	140
B	6	Low	Doctor	50-90%	140
B	7	Low	Doctor	15-50%	115
B	8	High	Doctor	15-50%	185
				TOTALS	$930

The unadjusted penalty was reduced a total of 40 percent to allow a 20-percent reduction for good faith and a 20-percent reduction for previous history. No reduction was allowed for size. A further reduction of 50-percent was allowed for abatement.

Law and Opinion

Section 5(a)(2) of the Act provides that each employer shall comply with occupational safety and health standards promulgated under the Act. The standards, when properly promulgated pursuant to section 6 of the Act, have the force of law. *Florida Peach Growers Assn.* v. *United States,* 489 F.2d 120 (5th Cir. 1974).

Respondent's primary argument is premised on its contention that section 4(b)(1) of the Act exempts it from any regulation by the complainant.[3] Section 4(b)(1) provides, in pertinent part, as follows:

[3] This issue is presently on review by the Commission in several cases. See, e.g., *Secretary of Labor* v. *Southern Pacific Transportation Co.*, Docket No. 1348, *Secretary of Labor* v. *Union Pacific Railroad Co.*, Docket No. 1697; *Secretary of Labor* v. *Seaboard Coast Line Railroad Co.*, Docket No. 2802; *Secretary of Labor* v. *Union Railroad Company,* Docket No. 4318.

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, * * *, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The exemption is limited to specific working conditions of employees over which another Federal agency has exercised its statutory authority to regulate safety and health conditions of employees. The key words are "working conditions", "exercised" and "statutory authority."

Respondent's argument is in essence to the affect that the railroad industry is entitled to a blanket exemption because it is statutorily regulated by another Federal agency. A history of railroad safety legislation and a complete listing of all legislation enacted and regulations presently in effect have been referred to by the respondent. A review of the regulations presently in effect by the Department of Transportation reflects that the Secretary of Transportation has not exercised any authority to cover the conditions for which respondent has been cited. Respondent does not contend to the contrary but argues that the Federal Railroad Safety Act of 1970 (45 USC 421 *et seq.*) gives the Secretary of Transportation the authority to cover every aspect of safety in the railroad industry.

Respondent's basic argument was presented and rejected in *Secretary of Labor* v. *Penn Central Transportation Co.*, Docket No. 738 (Review Ordered). While the case has no precedent value because it is on review, the rationale of Judge Osterman in rejecting the argument is considered to be valid and persuasive. Judge Osterman stated:

• • • To hold that Section 4(b)(1) excludes an industry from the coverage of the Act simply because some aspects of the industry operations are regulated by a Federal agency, would be tantamount to excluding many major industries from the coverage of the Act, a result not intended by the Congress. It seems relatively clear from a reading of the Railroad Safety Act that this statute is concerned principally with the operation of railroads from the point of view of passenger safety and the avoidance of accidents resulting from faulty equipment. Although it is reasonably clear from a reading of Sections 421 and 431 of 45 U.S.C. that the Department of Transportation does have the authority to issue regulations dealing specifically with working conditions which affect, in a broad sense, the health and safety of railroad employees, the Respondent railroad can only be exempted from the operation of the Occupational Safety and Health Act of 1970 if it is shown that the Department of Transportation or some other Federal agency by regulation has in fact exercised its authority in this area.

Section 202(a) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431 (a)) directs that:

> The Secretary of Transportation shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on the date of enactment of this Title • • •

Respondent argues that this grant of regulatory power to the Secretary of Transportation clearly covers every aspect of safety in the railroad industry. Assuming *arguendo* that the Secretary of Transportation has the authority to regulate the working conditions of all employees in the railroad industry,[4] that authority has not been exercised

[4] In *Secretary of Labor* v. *Union Railroad Company*, Docket No. 4318 (Review Ordered), Judge Chalk rejected the contention that

to cover the conditions for which respondent has been cited in this case.

The mere fact that the Secretary of Transportation may have statutory authority to cover every aspect of safety in the railroad industry does not *per se* exempt the industry. The Secretary of Transportation must have the statutory authority and exercise that authority to specific working conditions prior to the railroad industry being exempt as to those working conditions. Section 4(b)(1) refers to other Federal agencies which "exercise" statutory authority and not simply to Federal agencies which have statutory authority. The Secretary of Transportation may have the authority,[5] but there has been no exercise of that authority to exempt the working conditions in issue in this case.

Respondent also argues that Congress intended that industries be exempt rather than working conditions. This position is premised on the fact that two members of congress in the debate in the House of Representatives on the Act used the word "industry" in referring to what would be exempt.[6] Respondent also submits that an industry exemption is consistent with the use of the term "employments" in section 24(a) of the Act. This position is ably rejected in the Judge's decision in *Secretary of Labor* v. *Southern Pacific Transportation Co.* Docket No. 1348 (Re-

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the Secretary of Transportation had *carte blanche* authority to regulate the working conditions of all employees in the railroad industry. It is not necessary to reach that determination in this case since there has been no exercise of any authority to regulate the conditions for which the citations were issued in this case.

[5] A point which it is deemed unnecessary to determine in this case.

[6] Respondent refers to the discussion between Congressmen Daniels and Erlenborn. Daily Congressional Record, H. 10630 (November 23, 1970).

view Ordered). The rationale of the Judge in *Southern Pacific Transportation* is persuasive and adopted herein even though the case is on review and can not be considered to have any precedent value.

The meaning of section 4(b)(1) must be determined from the language used therein. Section 4(b)(1) specifically refers to "working conditions" and not industries. There is no ambiguity in the use of the term "working conditions" which necessitates any resort to the legislative history. The discussion between Congressmen Daniels and Erlenborn can not be considered an accurate gauge of the view of the majority of the congressmen and senators that voted for final passage of the Act. As the Supreme Court stated in *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 318 (1897):

> There is, too, a general acquiescence in the doctrine that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. [citations deleted]
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. • • •

In *Secretary of Labor* v. *Mushroom Transportation Co., Inc.*, No. 1588 (November 7, 1973), (Appeal filed, 3rd Cir., January 31, 1974) the Commission recognized that section 4(b)(1) of the Act was intended to avoid a duplication in the enforcement efforts of Federal agencies but concluded

that there was an intent to have no hiatus in the protection of employees. The declared purpose of Congress in enacting the Act, as expressed in section 2(b), was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." This declared purpose is inconsistent with respondent's argument that Congress intended to exempt industries which are regulated by other Federal agencies even if they did not afford protection to employees within the industry.

In *Mushroom Transportation Co.*, the Commission stated:

> Once another Federal agency *exercises its authority over specific working conditions*, OSHA cannot enforce its own regulations covering the same conditions. (Underlining added)

The conclusion that section 4(b)(1) is a limited rather than a blanket exemption is implicit in the statement of the Commission. Employees are entitled to protection. If specific working conditions are covered in regulations issued by other Federal agencies, then the standards and regulations promulgated under the Act and applicable to the same working conditions will not apply. Where another Federal agency does not regulate specific working conditions of employees the Act is applicable to those employees. The exemption under 4(b)(1) applies to working conditions of specific employees rather than to specific industries. This interpretation is not inconsistent with the reference to employments in section 24(a) of the Act.

The respondent is subject to the standards cited since there has been no exercise of authority by the Secretary of Transportation to cover the specific working conditions involved. The violations conceded by respondent, subject to the 4(b)(1) argument, are deemed violations of the Act. The applicability of two standards to the facts of record have been disputed by respondent and must be determined on the merits.

1. *Alleged Violation of 29 CFR 1910.141(c)(1)(vii)*

Section 1910.141(c)(1)(vii) of 29 CFR provides as follows:

> For each three required toilet facilities at least one lavatory shall be located either in the toilet room or adjacent thereto. Where only one or two toilet facilities are provided at least one lavatory so located shall be provided.

Complainant alleges that respondent failed to provide at least one lavatory located in the toilet room or adjacent thereto for the four [7] toilet facilities provided on the ground floor of the coach paint shop.

The respondent stipulated that it had no toilet rooms housing its toilet facilities and that the lavatories were not immediately adjacent to the toilet facilities. The standard requires the lavatory or lavatories, depending on the number of toilet facilities, to be located in the toilet room or adjacent thereto. A toilet room, as defined by 29 CFR 1910.141(2)(vii), means a room containing toilet facilities for use by employees. Respondent submits that toilet rooms are not required since no females are employed or enter the building.

The facts support a violation of 29 CFR 1910.141(c)(1)(vii). The lavatories were not adjacent to the toilet facilities. While the standard specifies that at least one lavatory, for each three required toilet facilities, be located in the toilet room or adjacent thereto, the absence of a toilet room does not abrogate the necessity for the lavatories. The essence of the standard is that the lavatories are to be near the toilet facilities. Respondent concedes

[7] Paragraphs XII and XV of the stipulation refers to five toilet facilities provided on the ground floor of the paint shop, whereas the citation refers to only four toilet facilities. This discrepancy is immaterial to a determination of this issue.

that the lavatories were not located immediately adjacent to the toilet facilities. The violation is established.

2. *Alleged Violation of 29 CFR 1910.141(c)(1)(i)*

Section 1910.141(c)(1)(i) of 29 CFR provides, in part, as follows:

> Except as otherwise indicated in this subdivision (i), toilet facilities, in toilet rooms separate for each sex, shall be provided in all places of employment in accordance with table J-1 of this section. The number of facilities to be provided for each sex shall be based on the number of employees of that sex for whom the facilities are furnished. Where toilet rooms will be occupied by no more than one person at a time, can be locked from the inside, and contain at least one water closet, separate toilet rooms for each sex need not be provided. Where such single occupancy rooms have more than one toilet facility, only one such facility in each toilet room shall be counted for the purpose of table J-1.

Complainant alleges that respondent failed to provide a room or rooms for the four toilet facilities that were provided in compartments in the coach paint shop and for the toilet facilities in the blacksmith shop.

The present and contemplated use of the toilet facilities is by male employees. Female employees do not work in or enter the buildings where the toilet facilities are located. In view of this fact, respondent submits that there has been no violation of the standard. It is contended that the standard does not require separate toilet rooms where toilet facilities are used only by male employees.

The stipulation states that the toilet facilities were separately compartmented water closets. (Par. XV, Stip.) It is assumed that the compartments conformed to 29 CFR

1910.141(c)(2)(i) and that the partitions were sufficiently high to assure privacy.[8] The references in the standard to sex indicates that it is primarily designed to assure absolute privacy for male and female employees either by toilet rooms separate for each sex or by one such room where it will not be occupied by no more than one person at a time and can be locked from the inside.

Since no females work in or enter the buildings, the enclosing of the compartments within a separate room would add nothing to the privacy of employees. A separate room would certainly add nothing to the health or safety of employees involved. The stipulated evidence does not support the alleged violation.

Abatement Dates

Respondent contests the reasonableness of the abatement dates for all items. The contest of the abatement dates is premised on respondent's view that it should not be required to comply with the regulations of an agency in which the power to regulate has not been determined. Since respondent is deemed subject to the jurisdiction of the Act for the violations determined in this case, the argument raised by it is not a valid criteria for determining some other date as being appropriate for abatement. There is no evidence to reflect that the abatement dates are unreasonable and the abatement periods specified in the citations appear reasonable when construed in light of the violations to be corrected.

Penalty Determination

Once a notice of contest is served challenging penalties proposed by the Secretary, the authority to assess civil

[8] Paragraph XV states that the compartments had doors with separate latches. No mention is made as to the height of the partitions. However, respondent was not cited for a violation of 29 CFR 1910.141(c)(2)(i) and it must be assumed that the partitions afforded privacy.

penalties under the Act resides exclusively with the Commission. The Commission, in section 10(c) of the Act, is charged with affirming, modifying or vacating citations issued by the Secretary under section 9(a) and notifications issued and penalties proposed by the Secretary under sections 10(a) and 10(b) of the Act. The Commission is the final arbiter of penalties if the complainant's proposals are contested. In such an event the complainant's proposals merely become advisory. *Secretary of Labor* v. *Occupational Safety and Health Review Commission and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973)

The Commission is required by section 17(j) of the Act to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determining the assessment of an appropriate penalty. *Secretary of Labor* v. *Nacirema Operating Company, Inc.*, OSHRC Docket No. 4. In *Nacirema* the Commission stated that the four criteria to be considered in assessing penalties cannot always be given equal weight. The principal factor to be considered is the gravity of the offense. In determining the gravity of a violation, several elements must be considered, including but not necessarily limited to the following: (1) the number of employees exposed to the risk of injury, (2) the duration of the exposure, (3) the precautions taken against injury, if any, and (4) the degree of probability of occurrence of an injury. *Secretary of Labor* v. *National Realty and Construction Company, Inc.*, OSHRC Docket No. 85, reversed on another issue, 489 F.2d 1257 (D.C. Cir. 1973).

The Commission in *Secretary of Labor* v. *J. E. Chilton Millwork and Lumber Company, Inc.*, OSHRC Docket No. 123, indicated that relatively minor monetary penalties do little to effectuate the objective of the Act, namely, to insure a safe and healthful workplace. The same rationale was applied by the Commission in *Secretary of Labor* v.

General Meat Company, Inc., OSHRC Docket No. 250. Small monetary penalties were eliminated in both cases since the violations had been abated. However, this rationale was directed toward relatively minor violations of the Act which would be better described as *de minimis*. The Commission recognized that there would be instances where a small penalty would be justified. Whether small monetary penalties are justified must be determined by the relationship between the non-serious violation involved and the corresponding degree of gravity. *Secretary of Labor* v. *Hydroswift Corporation*, OSHRC Docket No. 591.

The complainant proposed the following penalties for the violations as indicated:

Citation No.	Item No.	Violation	Proposed Penalty
A	1	29 CFR 1910.309(a)	$ 45.00
A	2	29 CFR 1910.93(a)(2)	60.00
B	5	29 CFR 1910.27(b)(1)	40.00
B	6	29 CFR 1910.28(a)(9)	40.00
B	7	29 CFR 1910.28(a)(13)	30.00
B	8	29 CFR 1910.252(e)(2)(iii)	55.00

After due consideration of all factors specified by section 17(j) of the Act, with particular emphasis on the gravity of the violations, it is concluded that the penalties proposed by the complainant are fair and reasonable. The rationale expressed in *J. E. Chilton Millwork and Lumber Company, Inc.* is deemed inapplicable due to the nature and gravity of the violations.

Conclusions of Law

1. The respondent was at all times material hereto engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent is not exempt from the jurisdiction of the Act by virtue of the provisions of section 4(b)(1) of the Act since there has been no exercise of authority by the Secretary of Transportation to regulate the working conditions covered in this proceeding.

3. The respondent was at all times material hereto subject to the requirements of the Act. The Commission has jurisdiction of the parties and of the subject matter herein.

4. Respondent did not provide at least one lavatory adjacent to toilet facilities located on the ground floor of the coach paint shop and thereby violated section 5(a)(2) of the Act by failing to comply with the standard published at 29 CFR 1910.141(c)(1)(vii).

5. Since no female employees were employed or entered the coach paint shop and blacksmith shop, a room or rooms were not necessary to house toilet facilities. The standard published at 29 CFR 1910.141(c)(1)(i) is inapplicable.

6. The penalties proposed by complainant are fair and reasonable.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is

Ordered:

(1) The citation and notification of proposed penalty issued to respondent on November 2, 1973, and pertaining to the alleged violations of 29 CFR 1910.309(a) and 29 CFR 1910.93(a)(2) are affirmed; and

(2) Items 2 and 4 of the citation and notification of proposed penalty issued to respondent on November 2, 1973, and which contains eight (8) alleged violations, are vacated. Items 1, 3, 5, 6, 7 and 8 are affirmed.

Dated this 4th day of June, 1974.

/s/ JAMES D. BURROUGHS
James D. Burroughs
Judge

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC DOCKET No. 5566

SECRETARY OF LABOR, Complainant

v.

SOUTHERN RAILWAY COMPANY, Respondent

Decision

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

This matter raises the identical issue we resolved in *Southern Pacific Transportation Co.*, OSHRC Docket No. 1348 (Rev. Com'n., November 15, 1974). Respondent, a railway, received two citations resulting from the inspection of its maintenance and repair facility located in Spartanburg, South Carolina. The citations alleged failure to comply with ten occupational safety standards in violation of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*; hereinafter "the Act").

Respondent defends herein on the ground that section 4(b)(1) creates an industry-wide exemption for the railway since the Secretary of Transportation has promulgated some safety regulations. Judge Burroughs rejected the defense and thereby correctly anticipated our decision in *Southern Pacific*. The Judge then turned to the merits. Based on admissions and a stipulated record he affirmed nine items and vacated one. Neither party assigns error to his disposition on the merits.

Accordingly, for the reasons given in *Southern Pacific*, a copy of which is attached, and for the reason that there

does not appear to be any prejudicial error in the Judge's factual determinations, the Judge's decision is affirmed, and it is so ORDERED.

FOR THE COMMISSION:

/s/ WILLIAM S. MCLAUGHLIN
William S. McLaughlin
Executive Secretary

DATE: November 26, 1974.

MORAN, Chairman, Dissenting:

I dissent for the reasons given in my dissenting opinions in *Secretary* v. *Southern Pacific Transportation Company*, —— OSAHRC —— (Docket No. 1348, November 15, 1974) and *Secretary* v. *Seaboard Coastline Railroad Company*, OSAHRC —— (Docket No. 2802, November 18, 1974).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC DOCKET No. 1348

SECRETARY OF LABOR, Complainant

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Respondent

RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO,
Authorized Employee Representative

Decision

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

This matter[1] presents an important question of statutory interpretation involving section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*, hereinafter "OSHA"). It arose out of an inspection conducted by the Department of Labor (Labor) of Respondent's (Southern Pacific) shop facility located in Houston, Texas. As a result of the inspection Labor cited Southern Pacific for failure to comply with certain crane safety standards,[2] for failure to post an informational poster,[3] and for failure to maintain a log of injuries and

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[1] This case was consolidated with the case of *Penn Central Transp., Co.*, OSHRC Docket No. 738, for purposes of review. Subsequently both cases were consolidated with *Union Pacific R.R.*, OSHRC Docket No. 1697 and *Seaboard Coastline R.R.*, OSHRC Docket No. 2802 for purposes of oral argument. Pursuant to Commission Rule 10, we hereby sever the aforementioned cases so that separately written determinations may be made in each.

[2] 29 C.F.R. 1910.179(b)(5) and 179(j)(2).

[3] 29 C.F.R. 1903.2(a).

illnesses [4] contrary to sections 5(a)(2) and 8(c) of OSHA. Southern Pacific duly contested and the matter came on for hearing before Judge John C. Castelli. At the hearing, Southern Pacific conceded that it had not complied with the standards and regulations alleged to have been violated. Rather, it argued that in view of the terms of section 4(b)(1) of OSHA it is excepted or exempted [5] from compliance because the Secretary of the Department of Transportation (DOT) has exercised his authority pursuant to the Federal Railway Safety Act of 1970, 45 U.S.C. 421 *et seq.* (FRSA) and other earlier railway safety acts to promulgate and enforce safety regulations affecting the working conditions of railway employees. Labor concedes that DOT has authority to regulate all areas of employee safety for the railway industry. It argues that Southern Pacific is not excepted or exempted from OSHA and the standards and regulations cited in this case because DOT has not exercised its authority in the areas covered by the said standards and regulations.

The adverse positions may be summarized as follows: Southern Pacific contends that section 4(b)(1) exempts all working conditions in the railway industry because DOT

[4] 29 C.F.R. 1904.2(a).

[5] Despite some confusion as to the appropriate designation for section 4(b)(1), the parties generally agree that it operates to exclude something (whether particular industries or, as shown *infra*, particular working conditions) from the general applicability of the Act. Thus, the provisions of section 4(b)(1) are in the nature of an "exception", the function of which is to exempt (or exclude) some portion from the operative effect of the Act. See *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876 (6th Cir. 1944); *United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Electric Ry. Employees Local 1210* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3rd Cir. 1951). Accordingly, the party who claims the benefit of an exception has the burden of proving its entitlement thereto. *United States* v. *First City National Bank of Houston*, 386 U.S. 361 (1967); *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

has exercised some of its authority; and Labor contends that section 4(b)(1) exempts only those areas of employee safety in which DOT has exercised its authority. Judge Castelli, in essence, adopted Labor's view. He concluded that DOT had not exercised its authority to regulate railway employee safety in shop and repair facilities, and he affirmed the alleged violations of the OSHA crane standards and the alleged informational poster violation. He vacated the recordkeeping violation for the reason that DOT has promulgated accident reporting requirements.

On review of his decision Southern Pacific asks for reversal for the reasons given by it below; Labor asks for affirmance where violations were found below and for reversal of the Judge's disposition of the recordkeeping allegation; and DOT, appearing as an *amicus curiae* at our invitation, seeks affirmance of Judge Castelli's disposition. We have reviewed the record and have considered the arguments of all participants in this matter. For the reasons given hereinafter we affirm.

Section 4(b)(1) provides in pertinent part as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653(b)(1).

Obviously, the section is not self-defining for its terms can be construed to create the broad exemption Southern Pacific seeks or the narrow exemption for which Labor and DOT argue. Moreover, all parties point to the legislative history of the section as providing support for their respective views. And, indeed, the legislative history is as persuasive for one side as it is for the other.[6] Accordingly, it cannot be said to be dispositive of the issue.

[6] *See, e.g., Legislative History of the Occupational Safety and Health Act of 1970*, Committee Print, pgs. 162, 997, 1019, 1020, 1037, 1223 (1971).

Therefore we turn to the congressional findings and statements of purpose and policy for guidance. OSHA came about because workplace injuries and illnesses impose "a substantial burden upon, and are a hinderance to, interstate commerce," 29 U.S.C. 651. In order to alleviate this burden, Congress determined its purpose and policy was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). This policy can only be effectuated by interpreting OSHA to include rather than exclude working conditions of employees. Otherwise it cannot be said that the Nation's human resources were preserved "so far as possible."

But the interpretation sought by Southern Pacific would operate to exclude any coverage of working conditions in railway offices, shops, and repair facilities because DOT says it does not now regulate safety and health in such areas and it does not contemplate regulating these areas in the future. In this regard, we deem it highly significant that DOT joins with Labor in requesting a narrow interpretation of section 4(b)(1) for as DOT says "[t]o interpret the exemption as an 'industry' exemption would leave wide gaps in coverage."[7] We too cannot believe Congress intended such gaps in coverage.

Moreover, the interpretation sought by labor and DOT accords with the rule that exemptions from humanitarian and remedial legislation are to be narrowly construed. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490 (1945); *Spokane & I.E.R. Co.* v. *United States*, 241 U.S. 344 (1916); *Sterns* v. *Hertz Corp.*, 326 F.2d 405 (8th Cir., 1964); *Herren* v. *United States*. 317 F. Supp. 1198 (D.C. Texas; 1970), *aff'd* 443 F.2d 1363 (5th Cir., 1971).

Finally, we are not persuaded to a different result by the fact that the 91st Congress enacted the FRSA and the Rail

[7] Brief of the DOT at pg. 8.

Passenger Service Act of 1970 (P.L. 91-518) during the same session as and prior to the enactment of OSHA. As to the FRSA the question is not whether DOT has authority but rather whether that authority has been exercised. We have already addressed this argument. As to the Rail Passenger Service Act the argument is that since section 405(d) thereof precludes application of safety standards promulgated pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) to railroad employees OSHA standards could not have been intended to apply to such employees. The short answer is that we are dealing with OSHA and not with the Contract Work Hours and Safety Standards Act. In any event construction safety standards are not involved in this case.

Accordingly, we conclude that section 4(b)(1) of OSHA does not provide an industry exemption. Rather, it provides an exemption for specific working conditions. Thus, as in this case, when a Federal agency or department has authority to regulate safety and health working conditions in, e.g., railroad shops, and does not exercise that authority the said working conditions are subject to OSHA regulations.

We turn now to the matter of recordkeeping for a different situation pertains. DOT has exercised its statutory authority in this area; it requires accident reporting by railroad employers.[8] Labor seeks reversal of Judge Castelli's decision to vacate on the basis that recordkeeping requirements are not "working conditions" within the meaning of the exemption. We cannot agree.

A requirement to compile and maintain accident records is not unlike a requirement to collect, compile, and maintain statistical data relating to occupational safety and health. However, according to section 24(a) of OSHA (29

[8] See 49 C.F.R. 225.

U.S.C. 673(a))[9] Labor cannot impose a statistical program upon "employments excluded by section 4" of OSHA. In our view, section 4(b)(1) constitutes the only exclusionary provisions to be found in section 4.[10] Since both "working conditions" and statistical programs as to "employments" are excludable by operation of section 4(b)(1) we think it would make for an inharmonious construction of OSHA to require recordkeeping as to excepted or exempted working conditions or employments. Moreover, by its own terms, section 4(b)(1) applies to the entire OSHA and thus necessarily provides for an exemption from the recordkeeping requirements of section 8 (29 U.S.C. 657). Finally, the terms of section 8(d) (29 U.S.C. 657(d)) require the avoidance of imposing unnecessary duplication of recordkeeping requirements on employers. DOT requires recordkeeping, and, as we see it, Labor's argument, if upheld herein, would result in unnecessary duplication.[11]

Labor also argues for affirmance of its citation because its regulation involved herein (29 C.F.R. 1904.2(a)) goes

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[9] Section 24(a) provides, in pertinent part:

> "In order to further the purposes of this Act, the Secretary . . . shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act, but shall not cover employments excluded by section 4 of the Act." 29 U.S.C. 673(a).

[10] Labor would have us adopt a conclusion that the exclusionary provision of section 24(a) refers to section 4(a) rather than 4(b)(1). The argument is misplaced. By its plain terms section 4(a) refers to where OSHA shall apply; 4(b) states where it shall not apply.

[11] Through its brief filed herein DOT has offered to make its accident records available to Labor. We see no reason why the offer should not be accepted as a practical solution to the problem. Moreover, we believe the two departments are fully capable of resolving any differences they might have as to the kind of records that are required.

further or requires more than DOT's regulation. But as Commissioner Cleary said in speaking for the majority in *Mushroom Transportation Company, Inc.*, OSHRC Docket No. 1588, BNA 1 O.S.H.C. 1390, 1392, CCH Employ. S. & H. Guide, para. 16,881 at 21,591 (1973), "Section 4(b)(1) does not require that another agency exercise its authority in the same manner or *in an equally stringent manner.*" (emphasis added). We view Labor's argument herein to be directed to the sufficiency or adequacy of the DOT regulation. Accordingly, our decision in *Mushroom Transportation* is controlling and the citation must be vacated as to the recordkeeping allegation.

Therefore, the Judge's decision is affirmed, and it is so ORDERED.

FOR THE COMMISSION:

/s/ WILLIAM S. MCLAUGHLIN
William S. McLaughlin
Executive Secretary

DATE: November 15, 1974.

CLEARY, Commissioner, CONCURRING IN PART AND DISSENTING IN PART:

I concur with the holding of the lead opinion that section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), does not provide an industry exemption for the railroad industry. I dissent, however, from the holding that the recordkeeping requirements under the Act are inapplicable to respondent because it is already covered by the accident reporting provisions of the Federal Railway Safety Act of 1970, 45 U.S.C. § 421 *et seq.*

I.

On several other occasions the Commission has been called on to determine whether the language of section

4(b)(1) of the Act exempts various working conditions from the Act's coverage. In the Commission's first major decision on this point, *Mushroom Transport. Co., Inc.*, No. 1588 (November 7, 1973), *petition for review dismissed*, No. 74-1034 (3d Cir. 1974), the Commission held that a common carrier who was regulated by the Motor Carrier Safety Regulations of the Department of Transportation was exempted from compliance with specific OSHA standards related to wheel chocks.[12] The Commission's decision emphasized three considerations: Section 4(b)(1) is intended to avoid duplication in the enforcement of occupational safety and health regulations; once another federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions; and section 4(b)(1) does not require that the other agency's regulations be similar or even equally stringent.

In *Fineberg Packing Co.*, No. 61 (February 22, 1974), the Commission held that a meat processor who was subject to the provisions of the Federal Meat Inspection Act as amended by the Wholesome Meat Act of 1967, 21 U.S.C. § 601 *et seq.*, was not exempted from coverage under the Occupational Safety and Health Act. The Commission noted that the purpose of the Wholesome Meat Act is primarily to protect consumers, even though employees may receive incidental protection.[13]

> To be cognizable under section 4(b)(1), we conclude that a different statutory scheme and rules thereunder must have a policy of purpose that is consonant with that of the Occupational Safety and Health Act. That

[12] The Commission held that the OSHA standard at 29 CFR § 1910.178(k)(1) was pre-empted by the Motor Carrier Safety Regulations at 49 CFR § 392.20.

[13] This case involved alleged unsanitary conditions in change rooms, toilets, and waste room facilities in contravention of the OSHA standard at 29 CFR § 1910.141(a).

> is, there must be a policy or purpose to include employees in the class of persons to be protected thereunder.

Fineberg, supra (slip op. at 4).

The "policy or purpose" test expressed in *Fineberg* was again followed in *Sigman Meat Co., Inc.*, No. 251 (May 6, 1974), another food processing case.

Finally, in *Bettendorf Terminal Co.*, No. 837 (May 10, 1974), the Commission held that an employer located 10 miles from a quarry that only unloaded, dried, stored, and delivered sand was not engaged in "milling operations" and not exempted from coverage because of the Metal and Non-Metallic Mine Safety Act, 30 U.S.C. § 721 *et seq.* Thus, the Commission declined to extend an exemption under section 4(b)(1) to an employer who was only tangentially related to a business regulated by another safety act and who was never inspected by the Secretary of the Interior under the Mine Safety Act.

Three essential elements necessary for an exemption under section 4(b)(1) emerge from these cases. First, the policy or purpose of the other Act by virtue of which an exemption is claimed must be to assure safe and healthful working conditions for the benefit of employees. *See Fineberg, supra.* Such a finding is compelled by a reasonable reading of section 4(b)(1), the Commission's own precedent, and the legislative history of the Act.[14]

[14] In debate over the scope of exemption under section 4(b)(1) of the Act, Congress only referred to acts whose purpose was to assure safe and healthful working conditions for the benefit of employees. *See* Staff of Subcommittee on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 1018-20, 1037 (Comm. Print 1971) (hereinafter cited as "*Legislative History*").

The second requirement for an exemption under section 4(b)(1) is that the other federal agency actually exercises its authority to prescribe and enforce occupational safety and health standards. "[I]f an agency fails to promulgate or enforce regulations covering specific working conditions, the Act will apply to these conditions." [15] With respect to this possibility, Congressman Steiger, co-sponsor of the Act, remarked:

> While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health, but has taken no action, it is anticipated that these instances will be extremely rare. It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcement.[16]

The final requirement for an exemption under section 4(b)(1) is that the conditions covered by the OSHA standard are also covered by the regulations of the other agency. Although we held in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, the specific conditions regulated by OSHA must be included in the other regulations, or if there is a limited exclusion, the exclusion must be express and intentional.[17]

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[15] *Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 8-9).

[16] *Legislative History* at 997. *See also* the comments of Congressman Daniels, *Legislative History* at 1019-20.

[17] The purpose of this requirement is so that the mere coverage by another agency's regulation of one item in an OSHA standard will not serve to exempt the other items covered only by OSHA.

> Clearly, section 4(b)(1) is intended to avoid a duplication in the enforcement efforts of Federal agencies, the action of which provides job safety and health protection to employees. By the same token, there is perforce an intent to have no hiatus in the protection of employees.

Mushroom Transport. Co., supra at 2.

II.

In analyzing the present case in light of the announced test, our starting point is a determination of the policy and purpose of the Federal Railway Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* Section 421 of FRSA contains the Congressional declaration of purpose.

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421.

The fact that the FRSA has a broad purpose and is not limited to providing solely for the occupational safety and health of employees is not fatal. There is nothing in the FRSA or its legislative history that suggests that reducing employee injuries is only an incidental aim of the legislation.[18]

The next factor to consider is whether the Department of Transportation (DOT) exercised its authority to prescribe and enforce job safety regulations under the FRSA. With respect to the crane safety standards, conceded by respondent to be contravened in its shop facility, the evidence is uncontroverted that DOT has neither exercised its grant of authority in this area nor is in the process of implementing such regulations. As DOT itself points out in its amicus curiae brief:

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[18] *See 1970 U.S. Code Cong. & Adm. News* 4104-32.

> Even though DOT has broad authority to regulate railroad safety, it does not regulate all aspects of railroad safety. In general, DOT has not regulated offices and shop and repair facilities. . . .

Brief for DOT as Amicus Curiae at 6.

Inasmuch as no regulations have been promulgated by DOT, and none are in the formative stage, that would provide coverage for the working conditions in the shop facility of respondent, it must be concluded that respondent is not exempt from coverage under the Occupational Safety and Health Act. To adopt respondent's suggestion and hold that the enactment of the FRSA constitutes an industry-wide exemption would result in "wide gaps in coverage." [19] Such a consequence would be antithetical to the Act's express purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651(b). As the Fourth Circuit stated in reference to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*: "Remedial social legislation of this nature is to be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed." *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967), *cert. denied*, 389 U.S. 834 (1967).

I therefore concur with the lead opinion's finding of a violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(2), as to the specific standards in respondent's shops.

III.

In turning to the recordkeeping issue, it is apparent that DOT has exercised its Congressional grant of authority in

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[19] This view is shared by DOT. *See* Brief for DOT as Amicus Curiae at 8.

this area to require the filing of various accident reports.[20] Thus, the only other element to consider in exempting respondent from compliance with the recordkeeping requirements of OSHA is whether the conditions covered by OSHA regulations are covered by the FRSA regulations.

Part 225 of Title 49 of the Code of Federal Regulations contains all of the accident reporting provisions promulgated by the Federal Railroad Administration (FRA) under the Accident Reports Act, 45 U.S.C. § 40 and other statutes. The purpose of these accident reporting provisions is the disclosure of hazards in railroad transportation.[21]

Although at first glance these reporting provisions seem to duplicate the recordkeeping requirements of section 8(c)(1), 29 U.S.C. § 657(c)(1), and the regulations promulgated by the Secretary of Labor pursuant to that section of the Act, a closer look at the railroad reporting provisions indicates that vast numbers of accidents are excluded.[22]

Subpart (b) of 49 CFR § 225.14 excludes from the reporting provisions any injury to an employee that does not incapacitate the employee for more than 24 hours in a 10-day period. Under OSHA however, injuries without lost workdays, must be reported if a job transfer or termination results, if medical treatment other than first aid is

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[20] *See* 49 CFR § 225, discussed in detail *infra*.

[21] 49 CFR § 225.10. The accident reporting provisions cover injuries to employees, passengers, third parties, and damage to equipment.

[22] It may also be concluded that because recordkeeping requirements of OSHA are not substantive rules prescribing courses of conduct related to occupational safety and health, that these provisions are not subject to an exemption under section 4(b)(1). *See Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 9).

required, or if there is a loss of consciousness, restriction of work or motion, or the diagnosis of occupational illness.[23]

Subpart (e) of 49 CFR § 225.15 also excludes from the reporting provisions any accident that results from "horseplay." These types of injuries are includable under OSHA.

Finally, and most importantly, 49 CFR § 225.15(c) excludes from reporting any disability resulting from illness. The reporting of occupational illnesses was specifically intended by Congress to be an important part of the recordkeeping requirements of the Act.[24] Congress was well-aware of and much-concerned about the 390,000 new occurrences of occupational disease each year.[25]

Despite the much-quoted language in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, nothing that we stated in that decision should be construed as favoring exemptions under section 4(b)(1) of an entire field of occupational safety and health regulations when another agency's regulations only offer limited coverage. Such a construction clearly frustrates Congressional objectives and must be rejected.[26]

A close reading of the Act itself indicates that exact recordkeeping of occupational injuries and illnesses was one of the major aims of the Act. Recordkeeping procedures are specifically mentioned in sections 2(b)(12);[27]

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[23] *See* 29 CFR § 1904.12(c). With respect to occupational illness, *see infra.*

[24] *See S. Rep.* No. 91-1282, 91st Cong., 2d Sess., (October 6, 1970) at 16.

[25] *Id.* at 3.

[26] *Cf. Brennan* v. *O.S.H.R.C. & Gerosa, Inc.*, 491 F.2d 1340, 1343 (2d Cir. 1974); *Brennan* v. *O.S.H.R.C. & Santa Fe Trail Transport. Co.*, No. 74-1049 (10th Cir., October 23, 1974).

[27] 29 U.S.C. § 651(b)(12).

8(c)(1), (2), and (3);[28] 19(a)(3), (4), and (5);[29] and 24(a) and (b)(1) and (2).[30]

Although requiring the railroads to maintain OSHA records in addition to FRSA records would involve some duplication, this is a small price to pay for assuring that accurate records of all workplace injuries and illnesses are maintained. The recordkeeping requirements under the Act present neither an excessive burden nor a conflict with any FRSA procedures. Furthermore, Congress recognized that some duplication in compiling these records is inevitable.

Section 8(d) of the Act, 29 U.S.C. § 657(d) specifically states: "Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." Similarly, section 4(b)(3), 29 U.S.C. § 653(b)(3) reads: "The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws." With respect to this problem, the Senate Committee on Labor and Public Welfare stated the following:

> The committee recognizes the need to assure employers that they will not be subject to unnecessary or duplicative record-keeping requests and has specifically stated this intent in section 8(d). To that end the committee intends that, wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one Governmental agency and that other Governmental agencies, if any, should then acquire their information from the original agency.[31]

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[28] 29 U.S.C. § 657(c)(1), (2), and (3).

[29] 29 U.S.C. § 668(a)(3), (4), and (5).

[30] 29 U.S.C. § 673(a), (b)(1) and (2).

[31] *S. Rep.* No. 91-1282, 91st Cong., 2d Sess., (October 6, 1974) at 17.

It should be apparent that the long-range answer to the problem of duplication lies in inter-agency cooperation. Indeed, this was suggested by DOT in its brief.[32] In the meantime, however, the health and safety of all workers and the express purposes of the Act dictate that the railroad industry must comply with the recordkeeping requirements of the Occupational Safety and Health Act.

For these reasons I dissent from that portion of the lead opinion that would exclude respondent from its recordkeeping responsibilities under the Act.

MORAN, Chairman, Concurring in Part, Dissenting in Part:

The problem presented in this case would be nonexistent if Congress had not enacted more than one statute which regulated working conditions of employees. Nor would it have been present if Congress had provided in the Occupational Safety and Health Act of 1970 that this Act would regulate job safety and health conditions of all employees.

We are confronted with a jurisdictional question simply because Congress, over the span of many years, enacted a number of statutes which included provision for regulatory authority in order to improve safety conditions. Then, with full knowledge that it had done so, and having no intention to repeal or modify any of them, the Congress enacted the 1970 Job Safety Law and made it clear therein that its provisions would *not* apply

> ". . . TO WORKING CONDITIONS OF EMPLOYEES WITH RESPECT TO WHICH OTHER FEDERAL AGENCIES . . . EXERCISE STATUTORY AUTHORITY TO PRESCRIBE OR ENFORCE STANDARDS OR REGULATIONS AFFECTING OCCUPATIONAL SAFETY OR HEALTH."[33]

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[32] *See* Brief for DOT as Amicus Curiae at 12.

[33] 29 U.S.C. § 653(b)(1).

Primacy was given to the existing laws. The Job Safety Act's coverage was specifically subordinated to the others.

The expansive wording of § 653(b)(1) is a further indication that Congress intended no contraction of the coverage of the existing laws. If the other Federal agency exercises authority to "prescribe *or* enforce," Congress said, then this Act does not apply. The prescribing or enforcing authority is for either "standards *or* regulations" which may be "affecting" job "safety *or* health."

Had Congress intended the result the Commission is imposing today, it would have provided that this Act would apply to all employees

> EXCEPT WHERE ANOTHER FEDERAL AGENCY EXERCISES ITS STATUTORY AUTHORITY TO ENFORCE OCCUPATIONAL SAFETY AND HEALTH REGULATIONS.

We are told in the lead opinion that the congressional policy of assuring safe workplaces for all "can only be effectuated by interpreting . . . [the Job Safety Act] to include rather than exclude working conditions of employees."

This pronouncement should come as a surprise to those who believed that the Atomic Energy Commission was best qualified to protect employees from radiation dangers or that the Department of Interior had similar know-how for use in protecting coal miners or the Federal Aviation Administration was well-equipped to protect the crew of commercial airliners from the hazards connected with plane crashes. Unfortunately, employees engaged in such endeavors and who have benefited from the protection of AEC, Interior and the FAA for many years are not told exactly why the congressional purpose of assuring their safety "can *only* be effectuated" (emphasis supplied) by now substituting the Secretary of Labor for the agencies with particular expertise in the very specialized employments in which they work.

It is clear to me that Congress, in its wisdom, has exercised its legislative policy-making authority to create certain agencies of the executive branch for the purpose of regulating certain broad areas of our economy. This includes the three agencies used as an example in the preceding paragraph as well as the Federal Railroad Administration.

Can you separate responsibility for the safety of a train roaring down the track from that of the crew operating that train? Is it sensible to create an agency (the Federal Railroad Administration) and staff it with railroad experts in order to assure the public safety of those who use the trains but to then rule that responsibility for the safety of the employees of those railroads will be given over to an agency (the Department of Labor) which has no railroad experience at all?

Because I believe it is both senseless and contrary to law to so hold, I dissent from the Commission's decision holding this respondent liable for violating the Occupational Safety and Health Act of 1970. For the same reasons I concur with the view taken in the lead opinion on the recordkeeping charge.

The Commission, with this decision, has adopted a nook-and-cranny theory of safety regulation, i.e., if any Federal agency has not issued a regulation covering the configuration of toilet seats which are provided for employee use, for example, then the Department of Labor job safety standard on that subject will apply.[34] I do not believe that Congress intended a result that could lead to such absurdities. Congress recognized the railroad industry as a distinct segment of the economy and gave all regulatory power over that industry to the Department of Transportation and its Federal Railroad Administration.

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[34] 29 C.F.R. § 1910.141(c)(3)(ii).

The legislative history brings this out rather clearly. During the debates which preceded the passage of the Act, the following colloquy occurred in the House:

> MR. HATHAWAY. I call to mind the coal mine safety bill which is not repealed by this bill. Yet, the rules and regulations under this act, as provided in the committee bill, could and should and would get into the area of coal mine health and safety and the metallic and nonmetallic mine safety act and the health and safety act—all three of these would continue to exist and there would be no reason why the health and safety rules promulgated under this act would not also apply to those industries.
>
> MR. PERKINS. I would say to my distinguished colleague that he is incorrect in that statement because *all these various legislative acts as railway safety and mine safety are specifically exempted under section 22(b).* (emphasis supplied)
>
> MR. ERLENBORN. I stand corrected. . . . Is it your understanding that present Federal laws providing authority to the executive agency to prescribe health and safety standards that are being exercised will then exempt that *industry* from the coverage of this act? (emphasis supplied) . . . .
>
> MR. ERLENBORN. In other words, the mere existence of statutory authority does not exempt an industry? It is the exercise of that authority pursuant to the statute that does exempt it; is that correct?
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> MR. DANIELS of New Jersey. That is correct.
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> MR. ERLENBORN. I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised.
>
> Let me ask this question.

If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; does that then at the time it is exercised *exempt an industry?* (emphasis supplied)

MR. DANIELS of New Jersey. At the time that that authority is exercised, *that industry will be exempt.* (emphasis supplied)

MR. ERLENBORN. So this does have a prospective effect. In other words, we are not going to interpret this language only as thought [sic] it were being interpreted as to conditions that exist on the day it becomes law, but it will have a prospective effect and the future exercise of authority will then *exempt an industry* from coverage under this law? (emphasis supplied)

MR. DANIELS of New Jersey. *The gentleman is absolutely correct.* (emphasis supplied)

116 CONG. REC. 38381 (November 23, 1970); *Legislative History of the Occupational Safety and Health Act of 1970* (hereinafter *Legislative History*), Subcommittee on Labor, Committee on Labor & Public Welfare, United States Senate, 92nd Congress, 1st session, p. 1019-1020.

Not only do these members of Congress refer again and again to an "industry" exemption, Congressman Perkins, Chairman of the Committee which reported the occupational safety and health bill to the House floor, answers unequivocably that the "rules and regulations under this Act" will not affect existing legislation. In the same answer he declares that "railroad safety" specifically is exempted by Section 22(b) [of H.R. 16785]. Section 22(b), changed only slightly in wording, not meaning, became § 653(b)(1).

The Federal Railroad Safety Act grants the Department of Transportation authority to prescribe "as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . 45 U.S.C. § 431(a).

The authority to prescribe regulations "as necessary" would be meaningless if this Commission's nook-and-cranny theory applies, for the Secretary of Transportation is thereby deprived of the authority to determine that it is *not* necessary for railroad safety to regulate the configuration of toilet seats, for example. The power to regulate "as necessary" must include the authority to issue no regulations in such areas. To follow this Commission's reasoning to its logical conclusion would require a ruling that if the Secretary of Transportation did not deem such requirements necessary in the interests of railroad safety and the Secretary of Labor did think them necessary for employee safety, then the latter's judgment would prevail over the former's. Surely, if the Congress had intended such an unusual provision it would have been explicit in so stating.

Nevertheless, rather than consider the concrete evidence of congressional intent which the legislative history provides, the Commission finds that § 653(b)(1) must be narrowly interpreted in order to further the purposes of the Act.[25] Such reasoning presumes that Congress felt the Department of Labor alone was competent and could be trusted to effectively promote occupational safety and health. I find such reasoning arrogant and patently unjustifiable. Congress has consistently entrusted the De-

[25] I do not see that the Department of Transportation's support of the Secretary of Labor's interpretation of § 653(b)(1) is relevant. Jurisdiction of agencies is defined by statute, not by agreement between them. It is therefore our duty to resolve the question on the basis of what was legislated by Congress, not by what two departments *wish* Congress had done and what arrangement might be more convenient for their own interests.

partment of Transportation (and its predecessors) with full jurisdiction over the railroads. There is nothing in the legislative history which would supply any reason why Congress would take jurisdiction from one agency with long-standing expertise in a particular industry and give it to another, with none. Indeed, that history is exactly to the contrary.

It is my opinion that Congress envisioned a comprehensive program for employee safety under which the Department of Labor would have jurisdiction over those industries not under the regulatory authority of some other Federal agency. In furtherance of this purpose Congress enacted the Federal Railroad Safety Act on October 16, 1970. On October 30, 1970, it adopted the Rail Passenger Service Act and, less than 2 months thereafter, it adopted the Occupational Safety and Health Act of 1970. It was signed into law on December 29, 1970. Certainly Congress was aware of the interrelationships created by these statutes and intended them to work as a whole. To justify a broad interpretation of § 653(b)(1) because the Act is "humanitarian" or "remedial" implies that it is "more humanitarian" or "more remedial" than the other acts.[36]

In passing the laws referred to above (as well as others not referred to in this opinion), Congress enacted specific legislation for railroad safety (and for airplane safety, coal mine safety, nuclear energy safety, etc.). It intended to treat railroad safety differently and by including § 653 (b)(1) as part of the Job Safety Act it exempted that Act's

[36] Query whether a law intended to achieve public safety is more or less "humanitarian" or "remedial" than one designed to accomplish worker safety. The attempt to apply such a rule of construction in this situation is not only meaningless because of this problem but because § 653(b)(1) is not an "exemption" or "exception" of persons covered by other acts. As indicated at an earlier point in this opinion, the coverage of the other acts is given primacy and the coverage under the Job Safety Act is subordinated thereto.

coverage from the railroad safety arrangement it had already created.

The lead opinion makes reference to the provision of the Rail Passenger Service Act which excluded the application of certain Department of Labor safety standards to railroad employees,[37] but it ignored the significance of the inclusion of that exclusion. Respondent raised this reference in its argument on this case, not because it thought that the exclusion had any applicability here, but because it is further evidence of congressional intent. The reason Congress excluded railroad employees was because Congress had confidence in the Department of Transportation, and knew that all railroad safety was already under the jurisdiction of that Department and it wanted to be sure it remained there.

A further demonstration of congressional intent to leave all aspects of railroad safety under the jurisdiction of the Department of Transportation was included in the Conference Report on the Amtrak Improvement Act of 1973, 45 U.S.C. § 502, wherein it was stated that:

> The Federal Railroad Safety Act of 1970, enacted only two weeks prior to the Rail Passenger Service Act, defined the Secretary of Transportation's jurisdiction over railroad safety to include "all areas of railroad safety." It is the intent of the Committee of conference to make clear that *the Secretary's jurisdiction over railroad safety is exclusive.* 93rd Congress, 1st Session, H.R. Report No. 93-587.

Perhaps the most troublesome matter in this case results from the sheer volume of occupational safety and health

[37] It should be noted that there was a work safety law applicable to the construction industry which was administered by the Department of Labor and which pre-dated the enactment of the Job Safety Act. *See* 40 U.S.C. § 333. The exclusion in the Rail Passenger Act was from that law.

standards which have been promulgated by the Secretary of Labor pursuant to the authority given him in the Job Safety Act. It is estimated that it would take 1,400 typewritten pages to copy them, plus an additional 2,000 pages to type out all the regulations which apply but were not printed in the Federal Register because of an incorporation-by-reference referral to other documents. The regulations cover every conceivable aspect of human endeavor including the configuration of toilet seats,[38] the disposal of used hand towels,[39] the placement of fire extinquishers,[40] the amount of noise [41] and toxic chemicals to which an employee may be exposed,[42] and the color of fire exit signs.[43] Perhaps, in anticipation of the outcome of this case the regulations even specify what must be done during the loading and unloading of railroad cars.[44]

To read all the regulations would take days. To understand their full meaning and applicability is probably an impossible task even if one takes the time to read all the decisions of this Commission (which now cover more than 10 volumes of published material). Of course, no employer covered by this law needed to do all of this prior to the issuance of this decision. He could locate those matters applicable to his particular business or industry through an index to the regulations and would not have to concern himself with the others.

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[38] 29 C.F.R. § 1910.141(c)(3)(ii).

[39] 29 C.F.R. § 1910.141(d)(3).

[40] 29 C.F.R. § 1910.157.

[41] 29 C.F.R. § 1910.95.

[42] 29 C.F.R. § 1910.93.

[43] 29 C.F.R. § 1910.144(a)(1)(i)(d).

[44] 29 C.F.R. § 1910.178(k)(2).

However, because of the nook-and-cranny theory which is announced in this decision employers in the railroad industry must become familiar with all Department of Transportation railroad safety regulations, then they must figure out what has *not* been covered thereby. They must then look to the Labor Department's occupational safety and health standards to discover how these gaps in the railroad safety regulations are filled. Because of the flexible and obscure language employed in some such standards,[45] few such employers will be able to ascertain the applicability of the various regulations with any preciseness.

Difficulties of this kind will also affect the various inspectors and others who are responsible for seeing that the safety requirements are observed. Under such circumstances it is very unlikely that the intended purpose of the Job Safety Act can be fully realized or the intended beneficiaries of the law fully protected.

The concept of "working conditions" is elusive. Complainant takes the position that it refers to any specific hazard to workers. A reasonable application of that term, therefore, would include anything that could be classified as hazardous. It is difficult to think of anything that could not—at some time or other—be so classified whether it be an employee's hours of work, state of mind, age, or his personal feelings about how his employer and fellow employees treated him.

I mentioned the foregoing merely to indicate the pandora's box which the Commission has opened today. The decision also leads one to the inescapable conclusion that—in the opinion of two members of this Commission—Congress had no sense of order and intended to create confusion of the sort described. I don't share such a view. I am of the opinion that Congress intended to create a work-

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[45] See, for example, 29 U.S.C. § 1910.242(a) and 29 U.S.C. § 1910.132(a).

able system to improve occupational safety and health and that they were wise enough to leave all aspects of safety in the railroad industry in the hands of the railroad experts in the Department of Transportation.[46]

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[46] A clear indication that Congress intended no changes in the existing laws by its adoption of the Job Safety Act comes from the remarks of Senator Williams, the Act's principal Senate sponsor. During debate on November 16, 1970, just prior to a favorable Senate vote on the bill which was enacted, he stated:

> "There has been no description here that I have heard of the failure of any of these programs, whether it is construction safety, railway safety, or coal mine safety."